No. 44037-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

JOHN WALLACE LUCKWITZ,

Respondent,

vs.

BANDANA WAIKHOM,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE GREGORY GONZALES

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal is a continuation of the mother's attempts to limit the father's residential time with the parties' 9-year old child as much as possible. The father went to great efforts to maintain his "strong relationship" with the child, renting a small apartment in Ohio while primarily living and maintaining his medical practice in Washington to facilitate an agreed residential schedule that allowed the child to live with the father for one week each month in Ohio, plus certain school breaks and half of summer break in Washington.

Over two years later, the mother now seeks to eliminate the father's residential time during the school year entirely, even though there are no RCW 26.09.191 allegations that would justify restricting the father's residential time, based solely on the fact that the child was not offered re-enrollment in his private school for the next school year because of "behavioral" issues, which had begun to manifest prior to entry of the current parenting plan two years earlier.

The trial court did not abuse its discretion in dismissing the mother's petition for modification. The trial court also did not abuse its discretion in denying the mother's motion asking the court

to decline jurisdiction in favor of Ohio. Under the UCCJEA, Washington maintains exclusive, continuing jurisdiction because the father continues to live here. The trial court properly found that Washington was "not an inconvenient forum" for the parties to resolve parenting disputes because the child has residential time in Washington, the courts in Washington have continued to preside over post-dissolution litigation and are familiar with the family's history, and both parties have the financial ability to continue litigation in Washington. This court should affirm the trial court's orders and award attorney fees to the father for having to respond to this appeal.

II. RESTATEMENT OF FACTS

A. While The Dissolution Action Was Pending, The Son Was Allowed To Relocate With The Mother To Ohio. Although The Father Continued To Reside In Washington, Where His Medical Practice Is Located, He Rented A Small Apartment In Ohio To Facilitate Residential Time With His Son.

Respondent John Luckwitz, age 44, and appellant Bandana Waikhom, age 43, are the parents of S.L., age 9 (DOB 08/09/03). (CP 23, 141) Both parents are medical physicians. (CP 139) They were married on May 17, 1996 in San Diego, California, separated

on October 1, 2006, and divorced on April 19, 2010 in Clark County, Washington. (CP 73, 77)

While the dissolution action was pending, the court appointed Dr. Harry Dudley, a clinical psychologist, to evaluate parenting issues and assist the parties in reaching a final parenting plan for S.L., who was then age 6. (CP 23) Over the course of the proceeding, S.L. was temporarily allowed to relocate with Dr. Waikhom to Ohio. (CP 23, 38) Dr. Luckwitz considered relocating to Ohio, but ultimately decided against a move since he would earn one-third less in Ohio than in Washington, and he was concerned that if "he moved out there, then Dr. Waikhom could also move again, and he does not want to develop a practice only to be faced with relocation again." (CP 29) Dr. Luckwitz rented a small apartment near the Cincinnati Airport to facilitate weekend residential time with S.L.. (CP 23, 30-31)

B. The Parenting Evaluator Recommended The Son Reside Primarily With The Mother, With Liberal Residential Time With The Father. The Evaluator Counseled That The Parents' Discord Was Causing The Son Anxiety, Resulting In Behavioral Issues That Had Begun To Manifest.

The parenting evaluator, Dr. Dudley, described the parties' "dysfunctional marriage, which, while not including domestic

violence or spouse abuse, included levels of expressed antipathy that could be determined to reach the level of emotional abuse directed towards one another." (CP 50) Dr. Dudley described the parties as "highly polarized" with "chronic difficulties with communication." (CP 50) Both parents reported that Dr. Waikhom refused to communicate directly with Dr. Luckwitz, and that S.L. was aware of this "problematic dynamic" between the parents. (CP 31, 40) Dr. Waikhom acknowledged that "she has been advised by the court to communicate to Dr. Luckwitz in the presence of [S.L.], [but] she expressed concern that the conflict between her and Dr. Luckwitz precludes this, and she feels rather self-protective in that regard." (CP 40)

Dr. Dudley described S.L. as an "intelligent but anxious youngster" who "readily picks up the distress and negative affect of both parents, which contributes to his sense of anxiety." (CP 51) S.L.'s therapist described "both parents [as] quite anxious, and the child is attuned to this and is impacted by it." (CP 46) S.L.'s nanny said the divorce was difficult for S.L., and that he had "temper tantrums." (CP 50) Dr. Luckwitz saw S.L. as sometimes "moody" and "short-tempered," but said that S.L. was easy to "de-escalate." (CP 30) S.L.'s principal described S.L. as "intellectually advanced,

but immature in terms of his emotional and social development." (CP 49) The principal noted that while S.L. sometimes acted "nervous" and "apprehensive" when he was not sure which parent would pick him up, "he has become increasingly secure over time." (CP 49) Nevertheless, S.L. had been caught stealing items from the school. (CP 49) S.L.'s therapist thought these actions have "more to do with [S.J.]'s anxiety concerning attachment and stability rather than any type of antisocial behavior." (CP 39)

Dr. Dudley recommended that Dr. Waikhom be designated as the primary residential parent. (CP 51) In making his recommendation, Dr. Dudley described S.L. as an "intelligent but anxious youngster who is primarily attached to his mother, but has a strong relationship with his father as well." (CP 51) Recognizing that it was unlikely that Dr. Luckwitz would relocate to Ohio, Dr. Dudley recommended that "effort should be made to maximize the amount of time that the father and child have access to one another as time progresses." (CP 52) In the meantime, Dr. Dudley recommended that "during the school year, it is recommended that Dr. Luckwitz be afforded residential time with S.L. on weekends to the extent that he is able to make travel arrangements to go to Ohio." (CP 52) Dr. Dudley "assumed that the father's parenting

time may occur approximately twice a month." (CP 52) Dr. Dudley recommended liberal residential time between Dr. Luckwitz and S.L. during breaks, including every Spring Break and increasingly greater time during the summer. (CP 53)

Despite the parents' "profound difficulties communicating," Dr. Dudley recommended joint decision-making. (CP 51) Dr. Dudley recommended that the parties use a "parenting coordinator" who could work with the parties on their communication issues. (CP 52)

C. In January 2010, The Parties Agreed To Designate The Mother As The Primary Residential Parent, With The Father Having One Full Week Per Month In Ohio With The Son. The Parties Also Agreed To Appointment Of A Parenting Coordinator To Assist Them In Communication.

The parties agreed to a final parenting plan on January 5, 2010 designating Dr. Waikhom as the primary residential parent. (CP 54) The parties agreed to a graduated residential schedule for S.L. with Dr. Luckwitz, who retained an apartment in Ohio for his visitation. Starting in January 2010, S.L. would reside with Dr. Luckwitz for two weekends (six overnights) per month in Ohio. (CP 55) Starting in April 2010, S.L. would reside with Dr. Luckwitz for one week per month in Ohio. (CP 55-56) Except for certain school

breaks and half of summer, when S.L. resided with Dr. Luckwitz, S.L. would reside the remainder of the time with Dr. Waikhom. (CP 55-56)

The parties agreed to the appointment of Brett Clarke, MSW, of Ohio as a "parenting coordinator." (CP 63) The primary "role" of the parenting coordinator was to assist the parties to resolve disagreements between the parties. (CP 64-65) Mr. Clarke could make recommendations "for new or modified parenting provisions including not limited to the appropriate services, including medical, for the child, and how to coordinate these services." (CP 66) However, the parenting coordinator did not have authority to "modify custody or residential time [or] to recommend or impose supervision." (CP 65)

D. Litigation Between The Parties Continued. Among Other Things, The Mother Sought To Have Jurisdiction Transferred To Ohio And The Father Sought To Terminate The Services Of The Parenting Coordinator. Both Motions Were Denied In 2011.

The parties continued to litigate after the final parenting plan was entered. In October 2010, Dr. Luckwitz filed a motion for contempt, expressing concern that Dr. Waikhom was "constantly trying to thwart [his] relationship with [S.J.]." (Supp. CP ___, Sub no. 339) Dr. Luckwitz also presented evidence that the parties' still-

strained relationship was causing S.L. to act out at school. (Supp. CP ___, Sub no. 339) This motion was apparently never resolved.

In January 2011, Dr. Luckwitz sought to have Mr. Clarke removed as parenting coordinator. (CP 133) Dr. Luckwitz expressed concern that Mr. Clarke was biased against him because Dr. Luckwitz had challenged his work. (CP 134) Dr. Luckwitz also expressed concern that Mr. Clarke had billed over $10,000 in a 9-month period even though he had not successfully assisted the parties with the resolution of any issues. (CP 134) This motion was denied. (CP 399)

In May 2011, sixteen months after the final parenting plan was entered, Dr. Waikhom filed a motion asking Washington to decline jurisdiction in favor of Ohio. (CP 139) Clark County Superior Court Judge James Rulli denied the motion. (CP 139-40) The court noted that while Dr. Waikhom and S.L. reside in Ohio, Dr. Luckwitz still resides in Washington, and S.L. continues to reside with Dr. Luckwitz in Washington during certain school breaks. (CP 139-40) The court found that it was "familiar with this matter based on the fact that the dissolution case was filed and concluded in the State of Washington. This court has also conducted post-decree hearings." (CP 140) Finally, the court found

that "each party has substantial income which should not serve as a significant factor as far as one having to travel to one state or the other." (CP 140)

E. Just A Year Later, The Mother Sought To Eliminate All Of The Father's Residential Time During The School Year Due To Purported Behavioral Issues Of The Son.

On May 11, 2012, a little over two years after the final parenting plan was entered, Dr. Waikhom filed a petition to modify the residential schedule for S.L., then age 8, alleging that his "environment" under the current residential schedule was "detrimental to the child's physical, mental or emotional heath and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the child." (CP 141, 143) Dr. Waikhom alleged a "substantial change in circumstances" based on S.L.'s "emotional and behavioral health [deteriorating] to such an extent that he was not offered an enrollment contract for the 2012-2013 academic year at the private school he attends in Cincinnati." (CP 144) Dr. Waikhom claimed that the "existing residential schedule is emotionally and psychologically unsustainable for the child." (CP 144-45)

Although none of S.L.'s purported current "behavioral problems" were described (CP 147-50, 159-64), he had already exhibited some problems at the school before the final parenting plan was entered two years earlier. For example, in 2009 it was reported S.L. had "difficulty with focusing and staying on task" at school. (CP 46) S.L. had been "observed [by the school principal] testing limits and behaving aggressively towards his mother." (CP 49) S.L. was stealing from the school (CP 39, 49), and was described in 2009 as "behaving in an inappropriate or regressed manner" at times. (CP 47)

Dr. Waikhom blamed these purported "new" behavioral issues on S.L.'s one week of residential time each month with Dr. Luckwitz. (CP 148-50) Although Dr. Waikhom did not pursue any RCW 26.09.191 limitation on Dr. Luckwitz's residential time in her petition for modification, she proposed a new residential schedule that eliminated *all* of Dr. Luckwitz's residential time during the school year, except for certain school breaks. (Supp. CP ___, Sub no. 421)

Even though the parenting coordinator did "not have authority to modify custody or residential time [or] to recommend or impose supervision" (CP 65), Mr. Clarke issued a report

supporting Dr. Waikhom's petition and recommending that Dr. Luckwitz's "one-week-a-month visitation during the school year [ ] be discontinued." (CP 163) In making this recommendation, Mr. Clarke relied on reports from S.L.'s therapist and principal, who apparently both stated that it was the conflict between the parents that was causing S.L. distress. (CP 161: "[S.L.] is acutely aware of differences between his parents on even the smallest issues, and is in continual turmoil about having and voicing his own preferences and opinions") As the trial court noted, these individuals then took the "quantum leap" from S.L.'s distress being caused by the parents' conflict to S.L.'s distress being caused by his father's one week of residential time each month. (*See* 6/15/12 RP 10; CP 159-61)

Dr. Luckwitz acknowledged that S.L.'s "emotional and behavioral health has changed," but suggested that it was because S.L. "was gaining his independence as he grows older and he is questioning authority," not because of his one week of residential time with his father each month. (CP 171) Dr. Luckwitz stated if there were to be any change in the residential schedule, it should be to place S.L. primarily with him, because Dr. Waikhom continued to refuse to communicate or co-parent. (CP 171-72) Dr. Luckwitz once again expressed concern that it was Dr. Waikhom's continuing

animosity towards him that was causing S.L. distress, not S.L.'s residential time with Dr. Luckwitz. (CP 172)

Dr. Luckwitz's concern was consistent with the original parenting evaluator's conclusion that S.L. "readily picks up distress and negative affect of both parents which contributes to his sense of anxiety." (CP 51) As the original parenting evaluator noted, when anxious, S.L. has "difficulties socially, being at time intrusive and inappropriate in this regard, and at times regressing when distressed or anxious." (CP 46)

Dr. Luckwitz expressed concern that S.L. continues to feel forced to show allegiance to one parent over the other, which is causing him conflict. (CP 172) For example, Dr. Waikhom refuses to attend any school function, sports event, or even S.L.'s "acting debut" if she believed that Dr. Luckwitz will also attend. (CP 304) Dr. Luckwitz expressed concern that these "negative cues" from Dr. Waikhom negatively impact S.L.. (CP 304-05) Dr. Luckwitz noted that he believed Dr. Waikhom's petition was merely an attempt to further minimize his role in S.L.'s life. (CP 172)

F. The Trial Court Denied Adequate Cause After Finding There Was No Evidence That The Son's Behavioral Issues Were Caused By His Residential Time With The Father. The Trial Court Also Denied The Mother's Second Motion To Change Jurisdiction To Ohio.

Upon filing her petition for modification, Dr. Waikhom immediately sought to affidavit Judge James Rulli, who one year earlier had denied her motion to decline jurisdiction in favor of Ohio, claiming that Judge Rulli was "prejudiced against [her] or [her] case." (CP 154-55) This motion was apparently granted. Dr. Waikhom then filed her second motion asking the court to decline jurisdiction in favor of Ohio. (CP 180)

Clark County Superior Court Judge Gregory Gonzales retained jurisdiction over parenting issues. (CP 449-50) The court agreed with Judge Rulli's decision from one year earlier denying the mother's motion for Washington to relinquish jurisdiction. (CP 449) The court did "not find any facts or change in circumstances arising subsequent to that determination to provide a basis to decline jurisdiction." (CP 450) The trial court expressed concern that the mother's motion asking the court to decline jurisdiction was "almost the identical motion" as the one previously brought before Judge Rulli, with the added "twist" that the child's emotional

and behavioral problems caused the child to not be invited to return to his private school. (6/15/12 RP 31) The trial court denied the father's request for attorney fees to address the jurisdiction issue but stated that it would consider the request "down the road" if necessary. (6/15/12 RP 44)

The trial court dismissed Dr. Waikhom's petition for modification, finding no adequate cause for a hearing on the petition. (CP 446-48) The court found that the "declarations lack support for any type of so-called changed circumstances." (6/15/12 RP 4) The trial court denied adequate cause after finding that "there is not enough information from sources such as the child's mental health therapist and child psychiatrist to conclude that the existing residential schedule is causing the deterioration in the child's emotional and behavioral health." (CP 447)

The court questioned the mother's claims that it was the father's "one week out of the month" that "caused all of this emotional and change in behavior with this child." (6/15/12 RP 4, 9-10) Specifically, the court asked: "But I don't see how you can connect behavioral problems for this child, who will be nine this summer – who's having all these issues at school while spending the majority of the time with the mother, and how can you blame

the father for that?" (6/15/12 RP 10) The court declined to make the "quantum leap" that the mother was asking the court to make – connecting the child's behavior with the one week of out of the month that he resides with the father. (6/15/12 RP 12) Instead, the court found that it was the relationship between the parents that was "half the problem." (6/15/12 RP 12) The court noted that there is "so much turmoil [ ] between the two parents that it is filtering down to the child." (6/15/12 RP 22)

The court described Mr. Clarke's "investigation" as "overboard," noting that his duty under the order was to help the parties parent, not conduct investigations. (6/15/12 RP 5, 15) The court found that Mr. Clarke was no longer "neutral," and had become more of a "therapist." (6/15/12 RP 6, 15) Although the trial court reviewed Mr. Clarke's report, it "did not consider the opinions of the parenting coordinator concerning any changes to the child's residential placement." (CP 443)

Because the trial court found that the "lack of communication between the parents is a cause of the disputes," the court ordered the parties to work with the parenting coordinator to "begin communicating directly with each other for the best interest of the child concerning his health, welfare and education." (CP

444) The trial court ordered the parenting coordinator to "create a plan for improved communication between the parties" and to "provide information as to why he thinks the child is in turmoil." (CP 444) The trial court denied the father's request for attorney fees, but directed "the parties to present information that is factually based and not emotionally charged in the future" and cautioned that the court "may award attorney fees in the future if this pronouncement is violated." (CP 445)

The trial court denied the mother's motion for reconsideration on both jurisdiction and adequate cause, and awarded attorney fees to the father "solely for his need to respond to the [mother]'s request that the court reconsider its prior order denying Motion for Order Declining Jurisdiction." (CP 506)

The trial court rejected the parenting coordinator's "new" report "for purposes of the hearing on the respondent's motion for reconsideration." (CP 504-05) In this report, the parenting coordinator presented "additional information as to turmoil the child experiences related to the residential schedule." (CP 504) The trial court found that this information was not appropriate evidence in support of the motion for reconsideration because it "could have with reasonable diligence been available to the parties

at the time when the petition for modification of the parenting plan was pending." (CP 504; 8/08/12 RP 84-85)

The trial court expressed concern that this report, as well as the earlier report from the parenting coordinator, was riddled with hearsay from purported "experts." (8/08/12 RP 79) The court stated that the parenting coordinator "makes these conclusions [about the father's residential time being the cause of the child's distress] without specific facts." (8/08/12 RP 79)

The trial court noted that despite the fact that the mother relied heavily on alleged reports from the child's providers to the parenting coordinator that "the existing residential schedule is not emotionally or psychologically sustainable for the child, [ ] no declarations or reports have been produced by the experts themselves." (CP 504) This was particularly concerning in light of the father's own contact with these same providers, who denied making any direct connection between S.L.'s behavior and the residential schedule. For example, according to the father, the school principal acknowledged that "despite analyzing multiple forms of data, she could not pinpoint a particular pattern to [S.L.'s] aberrant behavior with respect to visitation. In other words, she said that she could not identify or predict if [S.L.] would have

behavior issues before, after, or during [the father]'s visits." (CP 481) The school principal had apparently also told the father that "much of [S.L.]'s behavior issues were disruptive because stricter behavior was required of third graders as they advance through the school year." (CP 481)

The trial court reaffirmed its order dismissing Dr. Waikhom's petition for modification, finding that her "alleged change in circumstances to support her present request for the trial court to decline jurisdiction, namely that child's emotional and behavioral health has deteriorated because of the residential schedule, is not supported by declarations or reports from the experts working with the child." (CP 505)

Dr. Waikhom appeals. (CP 508) Dr. Luckwitz does not challenge the trial court's dismissal of his cross-petition for modification.

III. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion In Retaining Jurisdiction In Washington.

Every year since the parenting plan was entered, the mother has sought to transfer jurisdiction to Ohio, where she and the child live. The trial court has properly denied the mother's motions,

recognizing that jurisdiction is based not on where the mother prefers to litigate, but on the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), which has been adopted by every state in the United States except Massachusetts.

Here, the original parenting plan was entered in Washington and the father continues to reside in Washington. Under the UCCJEA, there can be no dispute that unless Washington declines to exercise its jurisdiction, it maintains "exclusive, continuing jurisdiction" over parenting disputes. RCW 26.27.211 (1)(b); RCW 26.27.261 (1); *Custody of A.C.*, 165 Wn.2d 568, 575, ¶ 9, 200 P.3d 689 (2009) (UCCJEA provides that unless all of the parties and the child no longer live in the state that made the initial determination sought to be modified, that state maintains jurisdiction unless it declines to exercise jurisdiction).

The mother is wrong that the "moving party gets to choose the forum." (App. Br. 26, *citing Sales v. Weyerhaeuser Co.,* 138 Wn. App. 222, 156 P.3d 303 (2007), *aff'd*, 163 Wn.2d 14, 177 P.3d 1122 (2008)). In *Sales,* the plaintiff filed suit in Washington against Weyerhauser, a Washington corporation, for an injury that occurred in Arkansas. *Sales* was not a child custody action and was not governed by the UCCJEA. There is nothing in the UCCJEA that

supports the mother's argument that that the moving party "gets to choose the forum." Instead, whether a matter should be heard in an alternate forum is governed by RCW 26.27.261, which provides that "the issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court," and that a court "of this state which has jurisdiction [ ] to make a child custody determination" decides whether to decline to exercise its discretion.

Whether a court chooses to decline to exercise its jurisdiction in favor of another court because it deems it is an inconvenient forum is wholly within its discretion. RCW 26.27.261(1) (a court *may* decline to exercise its jurisdiction if it determines that a court of another state is a more convenient forum); *Welfare of Hansen*, 24 Wn. App. 27, 34, 599 P.2d 1304 (1979). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect

standard or the facts do not meet the requirements of the correct standard." *Littlefield*, 133 Wn.2d at 47.

Here, the trial court did not abuse its discretion in retaining jurisdiction when it determined that Washington was not an "inconvenient forum" to resolve parenting disputes between these two parties. (CP 449-50) The trial court found that the child continued to have residential time with the father in Washington, including every Spring break for two weeks, half of Summer break, and half of Winter break. (CP 56, 139-40, 449-50) The trial court also found that Washington was more "familiar with this matter" because it entered the final parenting plan and the courts here have presided over post-decree matters. (CP 140, 449-50) The trial court found that both parties had the financial means to litigate in Washington. (CP 140, 449-50)

That the child and mother have resided in Ohio for the past four years, where other evidence and witnesses may be present (RCW 26.27.261 (2)(b), (f)), alone is not a basis for the courts here to decline jurisdiction. (App. Br. 28-29, 31-33) In fact, under RCW 26.27.211, the UCCJEA presumes that a court can and should retain jurisdiction so long as at least one parent continues to reside in Washington, regardless of the absence of the child and the other

parent from the state. Washington does not lose jurisdiction because the primary residential parent and child have relocated out of state. Nor does the state become an "inconvenient forum," requiring the trial court to decline jurisdiction under the UCCJEA, because a parent relocated out of the state with the child.

The distance between Washington and Ohio (RCW 26.27.261(2)(c)) is also not a basis for the trial court to decline jurisdiction. (App. Br. 29) As the Comments to the UCCJEA state: "in applying [RCW 26.27.261(2)(c)], courts should realize that distance concerns can be alleviated by applying the communication and cooperation provisions of [RCW 26.27.111] and [RCW 26.27.121]." Comments, UCCJEA (1997) § 207. Under these statutes, a party may offer testimony of witnesses who are located in another state, and these individuals are permitted "to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state." RCW 26.27.111 (2). There is no evidence that the distance between Ohio and Washington has limited the mother's ability to litigate in Washington, as shown by the continuous litigation between the parties, led in part by the mother, since she moved to Ohio.

The mother and the parenting coordinator, who is located in Ohio, have both participated in the litigation in Washington by filing declarations. Although the mother claims that it is "highly unlikely" that the child's providers would voluntarily testify in Washington (App. Br. 32), there is no evidence that the child's providers have ever been asked. The mother's speculation that the child's providers would decline to participate is not a basis for Washington to decline jurisdiction.

Further, despite all of the mother's protestations (App. Br. 30-31), it is more cost effective for the parties to continue to litigate in Washington than to remove the case to Ohio. Both parents have had their current trial counsel since before the original parenting plan was entered in January 2010. (*See* CP 62) As evidenced by the record, parenting issues have been heavily litigated over the last 5 years. It would be significantly more expensive for both parties to be forced to retain new trial counsel in Ohio and to have new counsel and the Ohio courts come up to speed on this family's history. The trial court did not abuse its discretion in denying the mother's motion for Washington to decline jurisdiction.

B. The Trial Court Properly Denied Adequate Cause When There Was No Evidence That The Son's Behavioral Issues Were Related To The Current Residential Schedule With The Father.

The trial court did not abuse its discretion in denying a hearing on the mother's petition to modify the parenting plan to eliminate all residential time between the father and child except for certain school breaks. There is a strong presumption in favor of maintaining a child's residential schedule, because custodial modifications and the accompanying litigation are highly disruptive to children. *Marriage of McDole,* 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). Accordingly, the burden to proceed with a modification is high. The party seeking the modification must demonstrate that a substantial change in circumstances has occurred that requires modification of the residential schedule to protect the best interests of the child. RCW 26.09.260(1); *Schuster v. Schuster,* 90 Wn.2d 626, 628, 585 P.2d 130 (1978). Further, the court *must* retain the residential schedule established in the parenting plan unless the child's present environment is detrimental to the child's physical, mental, or emotional health, and the harm likely to be caused by a change of environment is

outweighed by the advantage of a change to the child. RCW 26.09.260(2)(c).

A modification action should only be allowed to proceed if the petitioner overcomes the threshold requirements of RCW 26.09.270 and proves that adequate cause exists to warrant a hearing on the modification petition. "Adequate cause" is "something more than prima facie allegations, which, if proven, might permit inferences sufficient to establish grounds" to modify the residential schedule. *Marriage of Roorda,* 25 Wn. App. 849, 852, 611 P.2d 794 (1980), *overruled on other grounds, Parentage of Jannot,* 149 Wn.2d 123, 126-27, 65 P.3d 664 (2003). At the very minimum, "adequate cause" means evidence sufficient to support a finding on each fact the petitioner must prove for a modification; otherwise, a petitioner could harass the other parent by obtaining a useless hearing. *Custody of E.A.T.W.,* 168 Wn.2d 335, 347, ¶ 22, 227 P.3d 1284 (2010); *Marriage of Lemke,* 120 Wn. App. 536, 540, 85 P.3d 966, *rev. denied,* 152 Wn.2d 1025 (2004).

The trial court's adequate cause determination may be overturned only for abuse of discretion. *Jannot,* 149 Wn.2d at 126. In *Jannot,* the Supreme Court reaffirmed the broad discretion granted the trial court to make adequate cause determinations, and

in doing so overruled earlier decisions, such as *Roorda*, which allowed *de novo* review by the appellate courts. 149 Wn.2d at 126-27. The Supreme Court recognized that "many local trial judges decide factual domestic relations questions on a regular basis, and the adequate cause determinations at issue here often involve facts that are very much in dispute." *Jannot,* 149 Wn.2d at 127. "[B]ecause adequate cause determinations are fact intensive, we recognize that a trial judge generally evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge's day-to-day experience warrants deference upon review." *Jannot*, 149 Wn.2d at 127.

Here, the trial court did not abuse its discretion in finding that the evidence presented did not show adequate cause to warrant further litigation between the parties over the child's residential schedule. The mother's petition for modification was premised on the child's behavior at school, which had allegedly deteriorated to a point where he was asked not to return to his private school the following school year. (CP 141-45) But as the trial court recognized, the mother and her witnesses failed to connect the child's purported deteriorating behavior at school with the residential schedule that the parties had been following for the past

two years. (CP 447) Accordingly, the trial court properly dismissed the mother's petition for modification. *See Mangiola v. Mangiola*, 46 Wn. App. 574, 578, 732 P.2d 163 (1987) *overruled on other grounds, Jannot,* 149 Wn.2d at 126-27.

In *Mangiola,* this court reversed a trial court's determination that adequate cause existed to modify a parenting plan when the moving party presented only "vague and general allegations" that the children were having "problems," and were "unhappy at home and at school." 46 Wn. App. at 578. The court noted that "even if we assume that the described problems exist and that they are significant, [the petitioner] has not suggested that any of the 'problems' were caused specifically by the environment at [respondent]'s home." *Mangiola,* 46 Wn. App. at 578.

This is the situation presented here. Even if the child's behavior was deteriorating, there was no evidence that these "problems" were specifically caused by the environment in the father's home, where the child resides only one week a month. This is especially true when there was evidence that the child already had behavioral issues that were manifesting even before the current parenting plan was entered two years earlier. Thus, the mother failed to present a "substantial change in circumstances" – "new

facts or facts unknown to the court when it entered the prior parenting plan" – to support modification. *Marriage of Tomsovic*, 118 Wn. App. 96, 109, 74 P.3d 692 (2003). Further, and also fatal to the mother's petition, the mother failed to present evidence that child's "present environment [in the father's home] is detrimental to the child's physical, mental, or emotional health." RCW 26.09.260 (2)(c).

The only evidence presented by the mother to connect the child's behavior with the child's residential schedule was speculation from the child's providers, offered through the parenting coordinator, that the behavior was related to the father's residential time. But the trial court simply did not find the purported opinions of the "experts" credible. (*See* CP 447; 6/15/12 RP 4, 9-10, 12) This court does not review the trial court's credibility determinations, nor weigh the conflicting evidence. *See Marriage of Woffinden,* 33 Wn. App. 326, 330, 654 P.2d 1219 (1982), *rev. denied*, 99 Wn.2d 1001 (1983).

Further, the mother's proposed modified parenting plan would have imposed significant restrictions on the father's residential time by eliminating all of the father's residential time during the school year except certain breaks. The mother conceded

there was no basis for restrictions on the father's residential time under RCW 26.09.191. (*See* Supp. CP ___, Sub no. 421) And the "court may not impose limitations or restrictions in a parenting plan in the absence of express findings under RCW 26.09.191." *Katare v. Katare*, 125 Wn. App. 813, 826, 105 P.3d 44 (2004), *rev. denied*, 155 Wn.2d 1005 (2005).

Finally, the trial court noted that the current school schedule left the child with the father for one week a month, and then three weeks straight with the mother. (6/15/12 RP 30) Thus, the concerns of the providers about the child's "constant shifting from mother's world to father's and back again" (CP 161) simply did not apply, where the "shift" between parents' homes only occurs twice a month – at the start of the father's residential time and at the end. (*See* 6/15/12 RP 22-23) The trial court recognized that "seemingly mother would have more of an influence on the child during those three weeks than the father would during his one week." (8/08/12 RP 99) The trial court found that "there wasn't sufficient information in that report, facts that would give rise to a reasonable conclusion that the father's residential time was causing the change in the behavior of this child." (8/08/12 RP 100; CP 447) Instead, the trial court noted that it appeared that the child was "so

sensitive" that he could not handle "everyday stresses," but that it was "not the father's fault." (6/15/12 RP 26-27) As such, the trial court did not abuse its discretion in dismissing the mother's petition to modify the parenting plan.

C. The Trial Court Did Not Abuse Its Discretion In Refusing To Consider The "Opinion" Of The Parenting Coordinator Regarding The Residential Schedule Or The Coordinator's "New" Report In Support Of The Mother's Motion For Reconsideration.

1. The Trial Court Did Not Abuse Its Discretion In Refusing To Consider The Parenting Coordinator's "Opinion" In His Report When It Found The Coordinator Not "Neutral."

The trial court did not abuse its discretion in refusing to consider the parenting coordinator's "opinions [ ] concerning any changes to the child's residential placement." (CP 443) The trial court stated that in making its decision on whether adequate cause existed to modify the parenting plan, it placed the most weight on the declarations of the parents and viewed the parenting coordinator's report with a "grain of salt." (6/15/12 RP 4: "[I]n the initial declaration [of the parties] without the parent coordinator report I think the declarations lack support for any type of so-called changed circumstances"; 6/15/12 RP 5: "I'm taking it with a grain of salt with respect to the parent coordinator"; 6/15/12 RP 9: "But you

understand you're placing so much emphasis on the parent coordinator and I'm not")

The amount of weight a trial court places on certain evidence is wholly within its discretion. *Marriage of Fahey*, 164 Wn. App. 42, 62, ¶ 43, 262 P.3d 128 (2011), *rev. denied,* 173 Wn.2d 1019 (2012). The trial court did not abuse its discretion by refusing to place weight on the parenting coordinator's "opinions" in his report when it found the parenting coordinator was not "neutral." (6/15/12 RP 6) The trial court stated that it believed that the parenting coordinator stepped beyond his role of "help[ing] the parties communicate and to better parent," and instead, took "somewhat of a non-neutral position in stating that the father, his one week on is causing the turmoil." (6/15/12 RP 15) The trial court found that the parenting coordinator's "opinions" recommending modification of the residential schedule was not the type of report that the coordinator was authorized to provide. (6/15/12 RP 25) While the trial court acknowledged that the parenting coordinator had authority to report information from the child's providers, it declined to consider the coordinator's "conclusions" from that information. (6/15/12 RP 25-26)

2. The Trial Court Did Not Abuse Its Discretion In Refusing To Consider The Parenting Coordinator's Second Report In Support Of The Mother's Motion For Reconsideration Containing Evidence That Could Have Been Presented Earlier.

The trial court also did not abuse its discretion in refusing to consider additional presented by the parenting coordinator in support of the mother's motion for reconsideration. The parenting coordinator purported to present more detailed information regarding the "turmoil the child experiences related to the residential schedule." (CP 522) But the trial court accurately pointed out that this was "information that could have with reasonable diligence been available to the parties at the time when the petition for modification of the plan was filed." (CP 522) Evidence presented for the first time in a motion for reconsideration, without a showing that the party could not have obtained the evidence earlier, does not qualify as "newly discovered evidence" for purposes of Civil Rule 59. *Marriage of Tomsovic*, 118 Wn. App. 96, 109, 74 P.3d 692 (2003).

In *Tomosovic*, the father sought reconsideration of the trial court's order dismissing his petition to modify the parenting plan. In his affidavit supporting reconsideration, the father presented

more detailed and specific evidence as to why modification of the parenting plan was both necessary and in the best interests of the children. In affirming the trial court's order denying the father's motion for reconsideration, Division Three noted that the "additional evidence [the father] presented to the trial court in the motion for reconsideration was available at the adequate cause hearing, and he fails to adequately explain why he should be excused for neglecting to bring these arguments to the court's attention. Considering the strong policy favoring custodial continuity and against disrupting children with modification, neglect in supporting a motion for modification with available evidence should rarely be justified as excusable." *Tomsovic*, 118 Wn. App. at 109.

Likewise here, the purported "evidence" presented by the parenting coordinator in support of the mother's motion for reconsideration was available to her when she brought her motion for adequate cause. The trial court did not abuse its discretion in refusing to consider the parenting coordinator's report in support of the mother's motion for reconsideration.

D. The Trial Court Did Not Abuse Its Discretion In Directing The Parties To Communicate More In The Best Interests Of The Child.

The trial court did not abuse its discretion in ordering the parent coordinator to assist the parties in directly communicating with each other "for the best interest of the child." (CP 444) There was substantial evidence to support the trial court's finding that it was "lack of communication between the parties" that was the cause of the issues raised by each party in the petition for modification. (CP 444) The father stated that the child was "very aware" of the mother's animosity towards the father because the child notices that the "mother refuses to communicate with [the father]." (CP 171) The father stated that this "has an effect on [the child] of forcing him to show allegiance to whichever parent he is residing with, causing him further conflict." (CP 172)

The father's statements are consistent with the original parenting evaluator's own observation when he reported that the child "indicated that his father wants to talk to his mother, but his mother does not want to talk to his father. [The child] reported that he thinks his mother hates his father because his mother does not want to see his father." (CP 44) Even the parenting coordinator reported that the child "believes that his mother has a negative view

of his father. This interferes with her ability to allow [the child] to find ways of identifying with this father." (CP 162)

The trial court properly found that it would be in the child's best interests to see his parents interact with each other. (*See* CP 444) The trial court acknowledged the parents' "dysfunctional" relationship and ordered the parenting coordinator to assist the parties with their communications. (CP 50, 444) The trial court also acknowledged that the communications should happen gradually, starting with email and text messages, and then the parties could "work[ ] towards direct communication on their own with the assistance of a third party provided such communication can be conducted civilly and safely." (CP 505) The trial court's decision, which was made in the best interests of the child, was well within its discretion and should be affirmed.

E. This Court Should Award Attorney Fees To The Father For Having To Respond To This Appeal.

Although the mother assigned error to the award of attorney fees (App. Br. 4), she has waived her challenge in this court by presenting no reasoned argument for her challenge within the Argument section of her brief, as RAP 10.3(a)(6) requires. Instead, the mother's challenge is mentioned only in passing in the

Conclusion of her brief. (App. Br. 45) This court should decline to consider this inadequately briefed challenge. *Matter of Guardianship of Atkins*, 57 Wn. App. 771, 775, 790 P.2d 210 (1990) ("An assignment of error not supported by argument or authority is waived.").

This court should award attorney fees to the father for having to respond to the mother's appeal, which is frivolous and intransigent, especially in regard to her persistent attempts to have jurisdiction moved to Ohio despite Washington's exclusive continuing jurisdiction. RAP 18.9(a) (authorizing terms and compensatory damages for a frivolous appeal); RAP 18.1; *Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114, *rev. denied,* 100 Wn.2d 1023 (1983) (an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney fees). The trial court has already awarded attorney fees to the father because of the mother's "almost identical" motions to transfer jurisdiction, which caused the father to incur unnecessary attorney fees, and this court should also award attorney fees to the father in this court. *See Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003). The mother's appeal challenges wholly fact-based discretionary decisions by the trial

court, which were made in the best interests of the child. This court should award attorney fees to the father.

IV. CONCLUSION

This appeal is simply an extension of the continued animosity that the mother has harbored against the father since they separated six years earlier. The reality of the parties' situation is that they share a child who needs both parents. Just because the parents divorced does not mean that the non-primary residential parent should also be divorced from the child. But that is exactly what the mother seeks here. The mother's tactic is apparently to pretend that the father does not exist. She refuses to communicate with the father or be in his presence. The mother moved with the child away from Washington to Ohio, and then sought to remove jurisdiction to Ohio despite the fact that Washington maintains exclusive, continuing jurisdiction because the father still lives in Washington. The mother also sought to eliminate any residential time for the child and father during the school year despite there being no basis under RCW 26.09.191 or on the "facts" presented by the mother.

The trial court's decisions retaining jurisdiction, dismissing the mother's petition for modification, and ordering the parties to communicate were all made with the child's best interests in mind and were within the broad discretion of this trial court. This court should affirm and award attorney fees to the father.

Dated this 28th day of December, 2012.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 28, 2012, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 28th day of December, 2012.

Tara D. Friesen